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DISTRICT OF NEW JERSEY

IN RE SCHERING-PLOUGH CORPORATION ERISA LITIGATION	Civil Action No. 03-1204 (KSH)(MF)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS AND APPROVAL OF PLAN OF ALLOCATION

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Plaintiff Michele Wendel, a participant in the Schering- Plough Corporation Employees' Savings Plan (the "Plan"),[1] respectfully submits this Memorandum of Law In Support of her Motion for an Order Granting Final Approval of the proposed class action settlement as set forth in the Class Action Settlement Agreement fully executed as of July 15, 2010 (the "Settlement" or the "Agreement").[2] The proposed Settlement was preliminarily approved by the Court on September 23, 2010 (Docket No. 146) (the "Preliminary Approval Order").

I. INTRODUCTION

This Settlement represents an excellent result for the Class, providing for the payment of $8.5 million ($8,500,000) into an interest-bearing escrow account ("Settlement Fund"), and resolves all claims asserted by Plaintiff in this litigation. Out of more than 20,000 Class members who received notice of the Settlement, only **one** lodged any form of objection. Plaintiff fought and negotiated vigorously for this Settlement. This litigation has lasted more than seven years during which time the Court granted Defendants' motion to dismiss the consolidated complaint which Plaintiff appealed, and subsequently, the Court granted Plaintiff's motion

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1 This definition includes the assets of the Schering-Plough Employees' Profit-Sharing Incentive Plan, which was merged into the Schering-Plough Employees' Savings Plan on or about September 10, 2004.

2 The Settlement Agreement was previously submitted to the Court on July 27, 2010 in connection with Plaintiff's Motion for Preliminary Approval as Exhibit A to the Declaration of Joseph J. DePalma ("DePalma Declaration"), Docket No. 140-2.

for class certification which Defendants appealed. Further, the parties participated in three formal mediation sessions in addition to informal discussions over the course of more than two years before finally resolving this case.

There is no doubt that lawsuits of this type brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") face significant risks as they involve complex claims and still evolving law. As detailed below, the risks included the very real possibility that, despite Plaintiff and Lead Counsel's best efforts, the Class would have received *less* monetary damages than the Class Settlement Amount or even nothing at all if this case were to proceed through trial.

As discussed below, the $8.5 million Settlement was only achieved after extensive negotiations between the parties with the assistance of an experienced and respected mediator. After reaching the proposed Settlement, Plaintiff subsequently presented it to the Court which resulted in the issuance of the Preliminary Approval Order on September 23, 2010. In the Preliminary Approval Order, the Court also preliminarily certified the Settlement Class and appointed the Named Plaintiff as a class representative of the Settlement Class. Under the governing standards for evaluating class action settlements in this Circuit, this Settlement is clearly fair, reasonable and adequate, and Plaintiff respectfully asks that the Court approve it. *See, e.g. Serrano v. Sterling Testing Systems, Inc.*, 711 F. Supp. 2d 402, 414 (E.D. Pa. 2010).

Further, as discussed below, on October 29, 2010, an independent fiduciary, Evercore Trust Company, N.A. ("Evercore"), was retained by Merck & Co., Inc. (the successor to Defendant Schering-Plough Corporation), and the Merck & Co., Inc. Management Pension Investment Committee (successor to Defendant Schering-Plough Investment Committee) to review the Settlement and provide a recommendation concerning whether to accept or reject the Settlement on behalf of the Plan. On November 19, 2010, Evercore informed the parties that, based on its evaluation of the relevant documents and information associated with the action and the Settlement, the $8.5 million cash Settlement was reasonable.[3]

Moreover, as noted, after mailing the approved form of Notice to 20,983 Class members, Lead Counsel has received only 2 responses thus far related to the Settlement. One response objects to the Settlement while the other response, while not objecting to the Settlement, expresses that the Settlement should have been for more money.[4] As discussed more fully *infra*, neither response specifies any meaningful basis for objection. As such, these responses should not impede the

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[3] The Evercore Independent Fiduciary Report is attached to the Declaration of Joseph H. Meltzer in Support of (1) Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Award of Case Contribution Award, and (2) Plaintiff's Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation ("Meltzer Declaration" or "Meltzer Dec.") as Exhibit H.

[4] The deadline for objecting to the Settlement Agreement expired on November 19, 2010.

Settlement. The Settlement should be finally approved and this Court should enter the proposed Order and Final Judgment granting final approval of the Settlement Agreement, approving the Plan of Allocation, and certifying a Settlement Class.

II. BACKGROUND

A. Brief Description of the Action[5]

This action was commenced on March 18, 2003 when two former employees of Schering-Plough and Plan participants (Jingdong Zhu and Adrian Fields ("Plaintiffs")), filed separate complaints asserting claims against Defendants[6] for breach of fiduciary duty under ERISA.[7] By Order entered July 30, 2003, the actions were consolidated, Schiffrin & Barroway, LLP[8] was appointed as

[5] A more detailed description of this action, including a description of Plaintiff's claims, Lead Counsel's investigation of the claims, a summary of the litigation, settlement negotiations, and the reasons for settlement were previously set out in the Memorandum Of Law In Support Of Plaintiff's Motion For Preliminary Approval Of Class Action Settlement And Notice Program (Docket No. 140-1) (the "Preliminary Approval Memo") at pages 2-9, 11-17.

[6] Defendants in this action are: Schering-Plough Corporation, the Schering Plough Employee Benefits Committee, the Schering-Plough Employee Benefits Investment Committee, Richard Kogan, Regina Herzlinger, Eugene McGrath, Donald Miller, Carl Mundy, James Wood, Patricia Russo, David Komansky and Kathryn Turner; and John Ryan, Vincent Sweeney, E. Kevin Moore, Jack Wyszomierski, and Joseph LaRosa.

[7] The initial complaints were styled *Zhu, et al. v. Schering Plough Corp., et al.*, No. 03-CV-1204 (D.N.J.) and *Fields, et al. v. Schering-Plough Corp., et al.*, No. 03-CV-1985 (D.N.J.).

[8] Schiffrin & Barroway, LLP has since changed its name to Barroway Topaz Kessler Meltzer & Check, LLP (referred to herein as "BTKMC").

interim lead counsel for Plaintiffs, Lite DePalma Greenberg & Rivas, LLC[9] was appointed as interim liaison counsel for Plaintiffs, and the caption was amended to read *In re Schering-Plough Corp. ERISA Litig.*, No. 03-CV-1204 (D.N.J.).

On October 6, 2003, Plaintiffs filed a consolidated complaint which Defendants subsequently moved to dismiss. On June 29, 2004, the District Court granted the motion to dismiss finding, *inter alia*, that Plaintiffs lacked standing to sue on behalf of the Plan. *In re Schering-Plough Corp. ERISA Litig.*, 387 F. Supp. 2d 392 (D.N.J. 2004). On appeal, the Third Circuit reversed and remanded the case for further proceedings on the merits. *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005).

On March 30, 2006, Plaintiffs filed their First Amended Consolidated Complaint (defined in the Settlement Agreement as the "Complaint"), which Plaintiff Wendel, a Plan participant and former employee of Schering-Plough, joined. On May 1, 2006, Defendants answered the Complaint but moved to dismiss Plaintiffs' misrepresentation/failure to disclose claim. The Court denied Defendants' motion to dismiss. On August 27, 2007, Plaintiff Wendel moved to certify a class. On January 31, 2008, the Honorable Mark Falk, U.S.M.J. issued a Report and Recommendation approving certification, which the District Court adopted on September 30, 2008. In its Order certifying the class, the District Court

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9 Lite DePalma Greenberg & Rivas, LLC has since changed its name to Lite DePalma Greenberg, LLC (referred to herein as "Lite DePalma").

appointed Plaintiff Wendel as a Class representative,[10] appointed the law firms of BTKMC and Hangley Aronchick Segal & Pudlin as Class counsel, and appointed the law firm of Lite DePalma as liaison counsel for the Class.

On December 29, 2008, Defendants filed a petition, pursuant to Federal Rule of Civil Procedure 23(f), to appeal the District Court's decision certifying the class to the Third Circuit. Despite Plaintiffs' opposition, the petition was granted. The issues on appeal centered around a Separation Agreement signed by Plaintiff Wendel, which contained a general release and a covenant not to sue. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 593 (3d Cir. 2009). The first issue was whether the ERISA § 410(a) rendered the release and covenant not to sue void as against public policy. *Id.* The Third Circuit found that it was not void. *Id.* at 594. The second issue was whether the release and covenant not to sue prevented Plaintiff Wendel from bringing claims under ERISA § 502(a)(2) on behalf of an ERISA plan, as Defendants maintained. *Id.* The Third Circuit found that it did not. *Id.* at 595.

The Third Circuit then examined whether Plaintiff Wendel satisfied the four prerequisites, under FED R. CIV. P. 23(a), for an individual to serve as class representative. The Third Circuit found that the "first two Rule 23 (a) prerequisites are plainly satisfied here." *Id.* at 596. Numerosity was satisfied since Plaintiff

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[10] On September 27, 2006 and October 12, 2006, Plaintiffs Zhu and Fields voluntarily dismissed their claims against Defendants.

Wendel's claim was brought on behalf of the Plan, and as of December 31, 2000, over 10,000 people were invested in the Plan. *Id.* The Third Circuit also found that the commonality requirement was satisfied. *Id.* at 597. With respect to typicality, the Third Circuit questioned whether the Separation Agreement could subject Plaintiff to unique defenses, bar her from serving as lead plaintiff, or disincentivize her so that her interests are not aligned with those of the class. *Id.* at 599-600. The Third Circuit further questioned whether other class members signed releases and covenants not to sue. *Id*. at 600. Notably, the Third Circuit did not resolve any of these issues, but instead instructed the District Court to conduct additional inquiry "into the factual circumstances of the members of the class and whether her release and covenant not to sue render her atypical." *Id.* The Third Circuit further found that the District Court should consider whether these issues affected Plaintiff's ability to adequately represent the class. *Id*. at 601-02. Thus, the Third Circuit vacated the class certification order and remanded the case for proceedings consistent with its opinion. *Id.* at 605.[11] As discussed *infra*, consistent with the Third Circuit's Opinion and Order, Plaintiff is a typical and adequate class representative.

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[11] The Third Circuit also remanded to the District Court the issue of an open-ended class period with instructions to the District Court to re-evaluate it prior holding. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 602-603. However, this issue is moot since, pursuant to the Settlement Agreement, the class period is defined as from July 29, 1998 to April 18, 2007.

B. Settlement Negotiations

The Parties negotiated the Settlement over the course of multiple years beginning in early 2007. The Parties engaged in an extensive exchange of information and analysis regarding their respective settlement positions, including information relating to: the performance of Plan investments during the relevant period; insurance availability to satisfy any possible judgment, including documents evincing the denial of coverage under the fiduciary insurance policy; settlements in analogous cases; and the precise number of shares of Schering common stock held by the Plan. On April 25, 2007, the Parties participated in a mediation conference and presented their respective arguments. After the mediation session did not result in an agreement, the Parties continued to litigate the case, all the while continuing to discuss the possibility of settlement.

On September 17, 2008, the Parties engaged in a mediation session before the Honorable Nicolas Politan, U.S.D.J. (retired). A resolution was not reached. On December 17, 2008, the Parties participated in another mediation session with Judge Politan, which also failed to result in an agreement. Finally, in February 2010, following further settlement discussion and an additional session before Judge Politan, the Parties reached substantial agreement on terms of Settlement.[12]

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[12] Judge Politan has submitted a declaration regarding his efforts in mediating this litigation to a successful conclusion. *See* Declaration of Nicholas H. Politan attached to Meltzer Declaration as Exhibit C.

The mediation sessions were intense, extremely complex, and vigorous. Both sides argued their respective positions strenuously. The resulting settlement was truly the product of arm's-length negotiation.

C. The Proposed Settlement

As noted above, the terms of the Settlement are memorialized in the Settlement Agreement. The Settlement Agreement provides that Defendants shall pay the sum of $8.5 million into a Settlement Fund. The net proceeds of the Settlement Fund (after deductions of attorneys' fees, expenses and any Case Contribution Award, as well as the expenses to administer the Settlement) will be allocated among the Settlement Class in accordance with the Plan of Allocation as set forth in the Settlement Agreement, and as described in this Memorandum of Law. Pursuant to the Settlement, the Plan and the Settlement Class will release all claims in this Action. *See* Settlement Agreement, Section 3.

D. Preliminary Approval, Notice to the Class, Absence of Objections

On July 27, 2010, Plaintiff moved the Court for preliminary approval of the Settlement. Docket No. 140. After a hearing on September 23, 2010, the Court granted Plaintiff Wendel's motion preliminarily approving the Settlement. Docket No. 146. The Court also scheduled a final fairness hearing and set forth a notice plan in the Preliminary Approval Order.

Pursuant to the Preliminary Approval Order, the approved Notice of Class Action Settlement was sent to 20,983 current and former participants of the Plan on October 12, 2010. *See* Affidavit of Anya Verkhovskaya, Senior Executive Vice President and Chief Operating Officer of A.B. Data, Ltd.'s Class Action Administration Division ("A.B. Data"), attached to the Meltzer Declaration as Exhibit I ("A.B. Data Affidavit"). Of these Notices, 1,767 were returned as undeliverable.

In addition, as also stated in the Court's Preliminary Approval Order, Plaintiff (through Lead Counsel), has created a dedicated Settlement website through which current and former Plan participants can: (1) view a summary description of the Action, the Settlement, and the status of the latter; (2) access the Settlement Agreement and related documents; (3) review answers to "frequently asked questions" regarding the litigation and the Settlement and (4) access a phone number to call for further information. The Internet site is located at http://www.ScheringPloughERISAsettlement.com/ and its contents and information were made accessible by the Court-mandated deadline and have been (and will be) updated as necessary. The Class Notice was also posted on the dedicated settlement website.

As of December 1, 2010 the website had received 164 hits. *See* A.B. Data Affidavit at ¶ 13 (detailing the number of times each document on the website was downloaded, and the total number of hits). Additionally, Lead Counsel received 9 emails regarding the Settlement from Class members, responded to 67 voicemails left through the Interactive Voice Response ("IVR") system maintained through A.B. Data. *See* A.B. Data Affidavit, ¶ 12.

As noted above, and discussed further below in section IIIA.2, after wide dissemination of the Notice and information concerning the Settlement, Lead Counsel has received only two written responses to the Settlement, only one of which was an objection. Meltzer Declaration, ¶ 34. Although Lead Counsel takes all meritorious objections seriously, the amount of objections, when compared to the sheer number of Class members, represents only a minuscule fraction of the individuals targeted by the Notice program, making the number of objectors *de minimis*, and not a significant obstacle to final approval of the Settlement.

E. The Independent Fiduciary's Report

As noted above, pursuant to sections 1.23 and 2.4 of the Settlement Agreement, Defendants retained Evercore to evaluate the fairness of the Settlement to the Plan, issue a release on the Plan's behalf, and evaluate the Settlement in accordance with Prohibited Transaction Class Exemption 2003-39 and ERISA § 406. After reviewing the "terms of the Settlement, including but not limited to the scope of the release, the plan of allocation, and the amount of legal fees requested by Plaintiff's counsel," Evercore determined that the Settlement is fair, and recommended that the Defendants accept the Settlement on behalf of the Plan. *See* Evercore report at 2. Accordingly, Evercore has approved the Settlement pursuant to Prohibited Transaction Class Exemption 2003-39 and ERISA § 406, and has also granted a release of the claims in this Action against Defendants on behalf of the Plan. *Id.* at 3.

F. Issues To Be Ruled Upon and the Standard Of Review

Plaintiff presents this Settlement to the Court for its review under FED. R. CIV. P. Rule 23, which provides in pertinent part:

> **(e) Settlement, Voluntary Dismissal, or Compromise.**
>
> (1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.
>
> (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

Settlements of disputed claims, especially of complex class action litigation, are clearly favored by the courts. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings."); *In re Pet Food Products Liability Litig.*, No. 07-CV-2867, 2008 WL 4937632, at *17 (D.N.J. Nov. 18, 2008) ("Overall, settlement of litigation is favored by the courts and particularly so in class action litigation."); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 459 (E.D. Pa. 2008) ("there is an over-riding public interest in settling class action litigation, and it should therefore be encouraged."); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*General Motors*") ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."). In the Third Circuit, "trial courts generally are afforded broad discretion in determining whether to approve a proposed class action settlement." *Serrano v. Sterling Testing Systems, Inc.*, 711 F. Supp. 2d 402, 414 (E.D. Pa. 2010); s*ee also Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) ("The decision of whether to approve a proposed settlement is left to the sound discretion of the district court.").

III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Settlement Clearly Satisfies the Third Circuit's *Girsh* Factors

Under Rule 23(e) of the Federal Rules of Civil Procedure, this Court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. *See Serrano*, 711 F. Supp. 2d at 414 (citing *Walsh v. Great Atlantic and Pacific Tea Co.*, 96 F.R.D. 632, 642 (D.N.J. 1983), *aff'd*, 726 F.2d 956 (3d Cir. 1983)). To determine whether the settlement is fair, reasonable and adequate under Rule 23(e), courts in the Third Circuit apply the nine-factor test enunciated in *Girsh*, 521 F.2d at 15, reaffirmed in *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534-35 (3d Cir 2004), and applied in a review of an analogous settlement in *In re Ikon Office Solutions, Inc., Secs. Litig.*: *Whetman v. Ikon*, 209 F.R.D. 94 (E.D. Pa. 2002) ("*Whetman v. Ikon*"). The Third Circuit held in *Girsh* that some of the factors relevant to the determination of the fairness of a settlement include:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation….

Girsh, 521 F.2d at 157 (citations omitted). *See also In re Schering-Plough/Merck Merger Litig.*, No. 09-CV-1099, 2010 WL 1257722, at *5 (D.N.J. Mar. 26, 2010) (acknowledging the appropriateness of the *Girsh* factors). An analysis of some or all of these factors here leads to the conclusion that this settlement is eminently fair to Plaintiff, the other members of the Settlement Class, and the Plan.

1. Complexity, Expense, and Likely Duration of the Litigation

"'This factor is intended to capture 'the probable costs, in both time and money, of continued litigation.'" *Whetman v. Ikon*, 209 F.R.D. at 104 (quoting *General Motors*, 55 F.3d at 812) (citations omitted)). This is an inherently complex and novel suit brought by a class of participants in and beneficiaries of the Plan seeking to hold the Defendant-fiduciaries accountable for the imprudent and ineffectual internal evaluation of the Plan's significant investments in employer securities. As one court recently noted, "ERISA law is a highly complex and quickly-evolving area of the law." *Smith v. Krispy Kreme Doughnut Corp.*, No. 05-CV-00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007).[13]

Indeed, in a recent analogous case, this Court determined this factor warranted final approval of the settlement due to, *inter alia*, the case's "long and often tortured procedural history" including that it "took the parties seven years and well over a hundred motions" to reach a settlement -- circumstances equally

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13 *See also In re Sprint Corp. ERISA Litig.,* 443 F. Supp. 2d 1249, 1270 (D. Kan. 2006) ("The applicable law is complex, unsettled, and in a rapid state of development"); *In re Xcel Energy, Inc. Securities, Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 1001 (D. Minn. 2005) ("*Xcel*") (approving an analogous ERISA settlement and noting that the court had previously characterized plaintiffs claims as arising from "'an area of developing and controversial law'" and that they "faced not only the difficult questions of the loyalty to plan fiduciaries who are also officers and directors of [the employer/plan sponsor], but also the interplay between ERISA and federal securities laws."); *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 284 F. Supp. 2d. 511, 555 (S. D. Tex. 2003); *Kling v. Fid. Mgmt. Trust Co.*, 323 F. Supp. 2d 132, 138 (D. Mass. 2004).

present here. *McCoy v. HealthNet, Inc., et al.*, 569 F. Supp. 2d 448, 460 (D.N.J. Aug. 8, 2008). As noted *supra*, this litigation has spanned more than seven years, and has been extremely complex as indicated by the two appeals to the Third Circuit Court of Appeals regarding the standing of Plaintiffs Zhu and Fields to bring the Action, and the appropriateness of class certification. By agreeing to the Settlement, the Parties have avoided further expense and potential delay which is a further appropriate reason for the Court to approve this Settlement. All of these factors weigh in favor of the Settlement. *See Serrano*, 711 F. Supp. 2d at 415 ("Even if the case proceeded to trial, achieving a result would likely be a lengthy and expensive process. Avoidance of this unnecessary expenditure of time and resources benefits all parties, and weighs in favor of approving the settlement"); *McGee v. Continental Tire North Am.*, No. 06-CV-6234, 2009 WL 539893, at *4 (D.N.J. Mar. 4, 2009) (". . . it is clear that litigation of this matter would be time-consuming, uncertain and expensive and that approval of the Settlement would secure a 'prompt and efficient resolution of the Class' claims permitting substantial recovery without further litigation, delay, expense or uncertainty.'") (citation omitted); *In re Ikon Office Solutions, Inc., Secs. Litig.*: *Karcich v. Stuart, et al.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) ("Finally, the extremely large sums of money at issue almost guarantee that any outcome, whether by summary judgment or trial, would be appealed. This factor thus weighs in favor of the proposed settlement.").

Accordingly, the potential for a continued lengthy, expensive and complex litigation of this matter strongly militates in support of Settlement.

2. The Reaction of the Class to the Settlement

"'This factor attempts to gauge whether members of the class support the settlement.'" *Whetman v. Ikon*, 209 F.R.D. at 104 (quoting *In re Prudential Ins. Co. of Amer. Sales Practices Litig.*, 148 F.3d 283, 308 (3d Cir. 1998)). Following the Court's granting of preliminary approval to the proposed Settlement, Lead Counsel undertook a comprehensive notice program directed to Class members. *See* A.B. Data Affidavit. The Notice informed Class members, *inter alia*, of the option and process for objecting to the Settlement Agreement and its terms. Despite the fact that over 20,000 notices were disseminated to Settlement Class members (including being posted to the dedicated Settlement website, http://www.ScheringPloughERISA settlement.com), Lead Counsel has received only two responses to the proposed Settlement. This relative lack of objections confirms the overwhelming approval of the Class of the Settlement and its fairness. *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 234-35 (3d Cir. 2001) (low number of objectors strongly favors settlement). Indeed, as the Third Circuit said in *In re Rite Aid Corp. Sec. Litig.*, "such a low level of objection is a rare phenomenon." 396 F.3d 294, 305 (3d Cir. 2005) (internal quotation marks and citation omitted); *see also In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2009 WL 411877, at *5 (D.N.J. Feb. 17, 2009) *amended*, MDL No. 1663, 2009 WL 2255513 (D.N.J. July 24, 2009) *aff'd sub nom*, *In re Ins. Brokerage Antitrust Litig*. MDL No. 1663, 2010 WL 779786 (3d Cir. Mar. 9, 2010).

The first written response, filed by Theresa Penn-Lavery, a purported Settlement Class Member on October 21, 2010,[14] objects to class action lawsuits in general, not the specific terms of this Settlement. *See* Penn-Lavery objection, attached to Meltzer Decl. as Exhibit J. This objection does not merit serious consideration as summary objections, which lack any explanation or authority, such as the objection here, should be overruled. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378 (D.D.C. 2002) (rejecting broad, unsupported objections because "[they] are of little aid to the Court.").

The second written response to the Settlement, filed on October 19, 2010 by James Sharits, addresses the Settlement in general terms as well, expressing the opinion that the Settlement should be larger. *See* Sharits response, attached to Meltzer Declaration as Exhibit K. Importantly, Mr. Sharits does not object to the Settlement. Moreover, Mr. Sharits does not provide any reasoning for his beliefs that are germane to this action; rather he mentions insider trading violations by upper management which caused the Company's decline. However, this action is for violations of ERISA, not securities laws. Thus, Plaintiff does not believe that

[14] Ms. Penn-Lavery does not identify whether she is a Settlement Class member.

the Penn-Lavery objection or the Sharits response to the Settlement should be any impediment to the final approval of the Settlement.

3. The Stage of Proceedings and the Amount of Discovery Completed

Given the extensive pre-settlement discovery conducted by Class Counsel, there can be little doubt that Plaintiff had an "adequate appreciation" of the case's merits when negotiating [the] settlement of the case. *Varacallo v. Mass. Mut. Life Ins.*,, 226 F.R.D. 207, 238 (D.N.J. 2005). Throughout this Action, Lead Counsel has conducted a thorough investigation into the claims and the allegations set forth in support in the Complaint. These investigative efforts included review of hundreds of thousands of documents produced by Defendants. In particular, in March 2006, Defendants produced to Plaintiff 600,000 pages of documents that had been produced in the parallel securities action.[15] Defendants subsequently also produced thousands of additional pages related to the Plan. Additionally, Plaintiff's investigative efforts included: (i) review of publicly-available materials relating to Schering-Plough and the Plan; (ii) analysis of specific corporate transactions; and (iii) interviewing numerous Plan participants. In addition, Plaintiff's counsel reviewed the files retained by several putative class members. All of these efforts of support approval of the Settlement. *See, e.g.*, *McGee*, 2009

[15] The parallel securities action is *In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829 (KSH) (D.N.J.).

WL 539893, at *5 (settlement favored where "the parties have conducted extensive discovery, motion practice and expert consultation, which has enabled them to evaluate the merits of the case, the risk of litigation and the value of settlement.").

Further, the Settlement negotiations were lengthy, often adversarial, and time-consuming. The Parties engaged in an extensive exchange of information and analysis regarding their respective settlement positions, including information relating to the performance of Plan investments during the relevant period, insurance availability to satisfy any possible judgment, including documents evincing the denial of coverage under the fiduciary insurance policy, settlements in analogous cases, and the precise number of shares of Schering common stock held by the Plan.

The Settlement was agreed upon only after a number of other proposals were considered, analyzed, and finally rejected. This Settlement was the result of informed, zealous advocacy for the best interests of the Plan, proposed Settlement Class and Defendants. Accordingly the stage of the proceedings here is ideal for settlement.

4. Risks of Establishing Liability and Damages[16]

"These inquiries 'survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement.'" *Whetman v. Ikon*, 209 F.R.D. at 105 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998)). In a sister district court opinion involving directly analogous claims, the court, after reaching the conclusion that significant legal and factual hurdles stand in the way of plaintiffs' establishment of defendants' breach of fiduciary duty liability under ERISA, described these type of ERISA claims as implicating "'a rapidly developing, and somewhat esoteric, area of law." *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 459, n. 13 (S.D.N.Y. 2004); *see also Mehling*, 248 F.R.D. at 461 (in analogous ERISA breach of fiduciary duty case, the court "agree[d] with Class Counsel that Plaintiffs would face serious legal challenges if the case were litigated rather than settled.").

It is Lead Counsel's considered opinion that settlement on the proposed terms at this juncture in the case, given the potential downside risks, upside rewards and concomitant costs of going forward, is the most prudent course for Plaintiff and the class to take. More specifically, as discussed *supra*, this case has

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16 Courts reviewing settlement in analogous actions have combined their analysis of the inherently related fourth and fifth *Girsh* "fairness" factors. *See, e.g.*, *Whetman v. Ikon*, 209 F.R.D. at 105-107.

twice involved an appeal to the Third Circuit regarding highly-contested issues of law. One of those challenges goes to the heart of the Settlement, as it challenged Plaintiff's adequacy to represent the Class, whether in the action or in this Settlement.

Further, Defendants have argued throughout this litigation that the Class Period asserted in the Complaint is overbroad. Defendants would likely have raised the complex issue of determining the appropriate points to begin and end the Class Period, including arguing that it should either begin and/or end at a point that would make proving damages much more difficult, if not impossible. *See Summers v. State Street*, 453 F.3d 404, 411 (7th Cir. 2006) ("So even if the methods of litigation could feasibly determine the point at which the ESOP trustee should sell in order to protect the employee-shareholders against excessive risk, the plaintiffs have made no effort to establish that point."). In this matter, the Class Period alleged in the Complaint extended to the present. It was only during negotiations of the Settlement that the Parties selected an end date for the Class Period. Thus, choosing an end-point, and then defending it, would have posed challenges to Plaintiff.

Further, proving damages caused by fiduciary misconduct would have been a painstaking, complex and expensive process, requiring expert assistance and involving myriad calculations to enable the fact-finder to determine the effect of the alleged imprudence. Here, it was far from settled that Plaintiff would succeed in proving damages exceeding the proposed Class Settlement Amount. In fact, one of the arguments Defendants proffered throughout the litigation was that Plaintiff would be unable to establish damages for Plan participants who were holders of Schering-Plough Stock throughout the Class Period in their Plan account, as opposed to being purchasers of the Company Stock during the Class Period. These "holders," according to Defendants, would not have been able to demonstrate damages because the loss in value of Company Stock would have inevitably occurred sooner or later. In particular, Defendants have argued that if Schering-Plough were found by a fact finder to have misrepresented and/or failed to disclose the Company's manufacturing concerns and risks to Clarinex approval, earlier disclosure would have simply resulted in a market correction in the value of Company Stock and thus "holders" would have no losses. Of course, Plaintiff has strong arguments against this contention, but some courts have found Defendants' argument to have merit.

Accordingly, there is little doubt that this litigation involved vigorously contested questions of law and, if the litigation were to proceed to trial, it would require Plaintiff to present significant facts and expert opinion to establish her basic breach of fiduciary duty claims regarding the Plan's imprudent investments in Schering-Plough Stock during the Class Period. There was thus a very real possibility of the Plan and Class receiving very little or no recovery after summary judgment and/or trial. *See In re Ins. Brokerage Antitrust Litig.*, 2009 WL 411877, at *6 (noting that "significant risk . . . in establishing both liability and damages" and likely "battle of experts" resulted in this factor weighing "strongly in favor of approval"); *In re Datatec Sys., Inc.*, No. 04-CV-525, 2007 WL 4225828, *4 (D.N.J. Nov. 28, 2007) (noting that risks relating to proving damages "are avoided by the settlement" and this weighs in favor of settlement.).

5. Risks of Maintaining Class Action Status Through Trial

The Court in *Ikon*, in evaluating an analogous settlement noted that "the value of a class action depends largely in the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. *Whetman v. Ikon*, 209 F.R.D. at 105 (quoting *General Motors*, 55 F.3d at 817). As noted herein, in this case, Plaintiff fought hard in her effort to maintain this action as a class action following Defendants' appeal of Magistrate Falk's January 31, 2008 Report and Recommendation approving certification, which the District Court adopted on September 30, 2008. While the Third Circuit found numerosity and commonality easily satisfied in this Action, the Court noted a potential concern regarding Plaintiff's adequacy and typicality. *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 596-602.

The Third Circuit vacated the class certification order and remanded the case for proceedings consistent with its opinion. *Id.* at 605.

Plaintiff believes that ultimately she would have prevailed on class certification. There is ample support in the record that Ms. Wendel's claims are typical of the Class's claims and that she is an adequate class representative. Ms. Wendel retained her rights to bring suit on behalf of herself and the Plan for any breaches of fiduciary duty by Defendants when she executed the Separation Agreement. The Separation Agreement did provide for the release of certain enumerated employment related claims, but clearly carved out from the release Ms. Wendel's rights to all benefits she was entitled to under the Plan, including lost benefits due to the imprudent investment of Plan assets in the Company Stock. The Separation Agreement plainly states that as result of Plaintiff Wendel's termination of employment she would receive "all other payments and benefits to which you are entitled under the Company's benefit plans, which will be described in a separate letter." *See* Wendel Separation Agreement attached to Meltzer Decl. as Exhibit B. Therefore, Plaintiff believes that under any circumstances she is and would remain an adequate and typical class representative.

Nonetheless, Plaintiff recognizes that Defendants would have argued strenuously that Plaintiff Wendel, by virtue of signing her Separation Agreement, could not be an adequate class representative. Thus, there was a risk in this case that Plaintiff would be unable to move forward with this action as a class action. The Settlement represents an extremely adequate result in light of the risk of maintaining a class through trial. When this risk is borne in mind, this factor also militates in favor of approval of its terms.

6. Ability of Defendants to Withstand Greater Judgment

Plaintiff does not contend that Defendants could not withstand a larger judgment, but this is no obstacle to approving the settlement. Countless settlements have been approved where a settling defendant has had the ability to pay greater amounts. *See, e.g.*, *Warfarin Sodium*, 391 F.3d at 538 ("[T]he fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the ... class members are entitled to under the theories of liability that existed at the time the settlement was reached."); *Young Soon Oh v. AT&T Corp.*, 225 F.R.D. 142, 150-51 (D.N.J. 2004); *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004); *Erie County Retirees Assoc. v. County of Erie, Pennsylvania*, 192 F. Supp. 2d 369, 376 (W.D. Pa. 2002). "This is especially true where, as here, the other [*Girsh*] factors weigh heavily in favor of settlement." *Global Crossing*, 225 F.R.D. at 460 (citation omitted). Accordingly, this factor presents no impediment to approval of the Settlement.

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All Attendant Risks of Litigation[17]

"This inquiry measures the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *General Motors*, 55 F.3d at 806. In *General Motors*, the Third Circuit further explained that:

> in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement... The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

Id. (citation omitted.)

As previously noted, the Settlement confers substantial benefits on the Class. The $8.5 million cash payment is – in Lead Counsel's estimation – an outstanding result. This is particularly true given the long, hard-fought litigation and extensive, arms-length negotiations preceding the resolution of this matter, all of which strongly support the conclusion that the Settlement should be approved. *See, e.g.*, *Whetman v. Ikon*, 209 F.R.D. 94 (complexity and duration of litigation of similar fiduciary duty claims, combined with the expense of litigation and risk of establishing liability and damages, weighed heavily in favor of settlement).

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[17] As with the fourth and fifth *Girsh* factors, courts reviewing settlements in analogous actions have combined their analysis of the inherently related final two *Girsh* "fairness" factors. *See, e.g.*, *Whetman v. Ikon*, 209 F.R.D. at 108; *Global Crossing*, 225 F.R.D. at 460-461.

While Plaintiff remains confident that she would prevail upon her claims, the ultimate outcome of a trial on the merits of Plaintiff's claims is far from a "sure thing." Indeed, as discussed in detail above, in this unsettled area of the law, there remains a paucity of even summary judgment decisions involving resolution of such claims, not to mention trials on the merits or on the proper method to calculate, assess and/or prove ERISA damages. To the best of Plaintiff's knowledge, only four ERISA company stock fund cases have been tried on the merits, each of which resulted in defense verdicts.[18]

Weighing the prospect of securing a guaranteed benefit for the Class against the uncertainty of continued litigation, Plaintiff respectfully submits that the Settlement is a reasonable compromise under the facts and circumstances of this case and falls well within the range for approval.

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18 *See DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756 (E.D. Va. 2006), *affirmed*, 497 F.3d 410 (4th Cir. 2007) (The Fourth Circuit affirmed the district court's ruling that defendants did not breach ERISA mandated fiduciary duties by continuing to offer company stock as plan investment option.); *Nelson v. IPALCO Enterprises, Inc.*, 480 F. Supp. 2d 1061 (S.D. Ind. 2007) (The court determined the defendant fiduciaries did not breach their fiduciary duties under ERISA by failing to remove company stock as a plan investment option.); *Langraff v. Columbia Healthcare Corp.*, No. 98-CV-0090, 2000 U.S. Dist LEXIS 21831 (M.D. Tenn. May 24, 2000) (same); *Brieger v. Tellabs, Inc.*, No. 06-CV-1882, 2009 WL 1565203 (N.D. Ill. June 1, 2009) (same).

8. The Settlement Is Presumed to Be Fair

In addition to all of the *Girsh* factors listed above, the Settlement is entitled to a presumption of fairness if the following are satisfied: "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 516; *see also Mehling*, 248 F.R.D. at 459 ("[a] proposed settlement which is negotiated at arms-length by capable counsel after meaningful discovery is presumed to be fair and reasonable."). As discussed *supra*, all of these factors are present in this matter.

IV. CERTIFICATION OF THE SETTLEMENT CLASS UNDER FED. R. CIV. P. 23 IS APPROPRIATE

In its Preliminary Approval Order, this Court preliminarily certified the following Settlement Class:

> All Persons (excluding the Defendants) who were participants in or beneficiaries (including alternate payees) of the *Plan* at any time between July 29, 1998 to April 18, 2007 and whose accounts included investment in the *Company Stock Fund* at any point during that time period.

As the Court has already found in granting Preliminary Approval, for the reasons set forth in Plaintiff's Motion for Preliminary Approval, which is specifically incorporated herein, and for the reasons set forth here, this Class meets all prerequisites for certification. The circumstances have not changed since the

Court's Preliminary Approval Order, and no objection has been filed as to the certification of such a Class. As such, the Class should now be finally certified under Rule 23.

A. The Class Is Sufficiently Numerous

Here, there are over 20,000 potential class members who received Notice of the Settlement which is more than sufficient to find that joinder of all parties is impracticable under Rule 23(a)(1).[19] Moreover, the Third Circuit has already found the Class to be sufficiently numerous. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 596 ("Numerosity, the prerequisite that the class be so numerous that joinder of all members is impracticable, is satisfied").

B. Common Questions of Law or Fact Exist

Rule 23(a)(2) is satisfied where the proposed class representatives share at least one question of fact or law with the claims of the prospective class. *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994); *see also Prudential*, 148 F.3d at 310. Here, the Third Circuit has found common questions to exist in this matter. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 596 (where the court found that "the requirement of commonality is satisfied here. The District Court, adopting the Report and Recommendation, correctly found that there were many questions of

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19 *See Stanford v. Foamex L.P.,* 263 F.R.D. 156, 166 (E.D. Pa. 2009) (finding 576 members satisfied "numerosity" requirement in certifying claim brought pursuant to ERISA § 502(a)(2)).

law or fact common to the named plaintiff and the class, including whether defendants were fiduciaries; whether defendants breached their duties to the Plan by failing to conduct an appropriate investigation into the continued investment in Schering-Plough stock; whether defendants breached their duties by continuing to invest in Schering-Plough stock and in continuing to offer the Schering-Plough Stock Fund; … and whether the Plan suffered losses as a result of defendants' breaches.") Courts have held that in order to meet the commonality requirement, a plaintiff need show only one common question of law or fact with the proposed class.[20]

C. Plaintiff's Claims Are Typical of Those of the Class

Typicality requires the Court to determine "whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members . . . ." *Wachtel*, 223 F.R.D. at 215 (quoting *Baby Neal*, 43 F.3d at 57). Whereas commonality evaluates the sufficiency of the class, typicality judges the sufficiency of the named plaintiff(s) as a representative of the class. *Baby Neal*, 43 F.3d at 57.

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[20] *See, e.g.*, *Moore v. Comcast Corp.*, No. 08-CV-0773, 2010 WL 1375462, at *5 (E.D. Pa. Apr. 6, 2010) (recognizing many common issues in ERISA case, stating that "[a] plaintiff need show only one common issue to fulfill the commonality requirement."); *Wachtel.*, 223 F.R.D. at 213 (noting that commonality is satisfied in an action where, if individual actions were brought, each plaintiff "would be required to prove that [defendants] . . . violated ERISA.")

A plaintiff's claim is typical of class claims if it challenges the same conduct that would be challenged by the class. *See Prudential*, 148 F.3d at 311-12 (holding that typicality was satisfied by allegedly fraudulent scheme applying to all class members, even if different illegal sales practices were used on different beneficiaries).

Here, as noted *supra*, The Third Circuit remanded the case for proceedings concerning Plaintiff's typicality and adequacy to serve as a class representative due to her signing of a Separation Agreement. As further noted *supra*, had those proceedings been conducted, Ms. Wendel would have demonstrated typicality and adequacy because the Separation Agreement did not eviscerate her rights under the Plan and ERISA. In fact, Ms. Wendel retained her rights under the Plan, including her rights to lost benefits due to the imprudent investment of Plan assets in the Company Stock. *See* Wendel Separation Agreement. Thus, as demonstrated herein, anyone signing the Separation Agreement, including Ms. Wendel, would not be subject to arguments that would make their claims different from or antagonistic to the claims of class members who did not sign a similar agreement.

By all accounts, Plaintiff is a typical and adequate class representative: she was an employee of Schering-Plough, a participant of the Plan during the Class Period, had part of her individual Plan investment portfolio invested in Schering-Plough Stock during that time and sustained injury arising out of Defendants' wrongful conduct as described herein and in the Complaint. Further, Plaintiff brings her claims pursuant to ERISA §§ 409, 502(a)(2) for plan-wide relief, so any relief obtained for such claims would inure to the Plan as a whole and, derivatively, its participants during the Class Period. *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 594 ("Indeed, a number of courts have held that, as a matter of law, an individual cannot release the plan's claims, and so for that reason an individual release cannot bar an individual from bringing a claim on behalf of an ERISA plan under ERISA § 502(a)(2).")[21] Accordingly, Plaintiff's claims are typical of the claims of the Class within the meaning of Rule 23(a)(3).

D. Plaintiff Is An Adequate Class Representative

Finally, Plaintiff, the proposed class representative meets the "adequacy" requirement of Rule 23. Rule 23(a)(4) requires a finding that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The requirements of Rule 23(a)(4) may be divided into two separate prongs:

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[21] *See also Bowles v. Reade*, 198 F.3d 752, 759-62 (9th Cir. 1999) (concluding that the plaintiff's § 502(a)(2) claims on behalf of the plans were unaffected by her release); *George v. Kraft Foods Global*, No. 08-CV-3799, 2010 WL 3386402, at *13 (ND. Ill. Aug. 25, 2010) ("The Court reads the release agreements in this case as addressing individual, non-benefit plan related claims that could have been brought against Kraft. They do not, however, release an employee's right to pursue relief on behalf of the Plan. Accordingly, the Court will not exclude individuals who signed releases from the class definition.").

> The adequacy of a named plaintiff depends upon two factors: counsel for the named plaintiff must be qualified, experienced and generally able to conduct the proposed litigation; and the named plaintiff must not have interests antagonistic to the class.

In re Honeywell Intern. Inc. Securities Litig., 211 F.R.D. 255, 260-61 (D.N.J. 2002); *see also Sosna v. Iowa*, 419 U.S. 393, 416 (1975). In this regard, "Defendants bear the burden of proving inadequacy." *Neuberger v. Shapiro*, No. 97-CV-7947, 1998 U.S. Dist. LEXIS 18807, at *10 (E.D. Pa Nov. 24, 1998). Both standards for meeting the adequacy requirement of Rule 23(a)(4) are quite easily satisfied in this action. Indeed, ERISA breaches of fiduciary duty actions such as the instant one are often found to easily meet both prongs of the adequacy requirement. *See Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 396 (E.D. Pa. 2001).

First, Plaintiff has no interests antagonistic to the interests of the absent Class members. The first prong of the "adequacy" requirement largely overlaps with the commonality and typicality requirements of Rule 23(a)(2)-(3). As discussed above, Ms. Wendel's execution of the Separation Agreement does not make her atypical and for the same reasons, does not make her inadequate. Plaintiff: (i) will have to prove the same wrongdoing by Defendants as the absent Class members to establish Defendants' liability; (ii) is in the exact same position as all members of the proposed class as all were invested in Schering-Plough Stock during the Class Period; and (iii) the class' claims inure to the benefit of the Plan as a whole. Plaintiff, a participant of the Plan during the Class Period, suffered injury from and is suing for *plan-wide* relief for identical alleged breaches of fiduciary duty on the part of Defendants and seek monetary and injunctive relief that will inure to the direct benefit of the Plan and therefore the entire proposed Class. As such, Plaintiff's focus is on recovering losses to the Plan (and, only indirectly, to themselves). Accordingly, there is no conflict between Plaintiff and members of the proposed Class as they share the same perceived harm, interests, and retributive ambitions (as it must be pursuant to the ERISA statutory provisions Plaintiff is suing under). Plaintiff's interests are squarely in line with those of the proposed Class.

Second, Plaintiff retained attorneys that are highly qualified, experienced and able to conduct this litigation. *See* Fee Memorandum at 24-26. BTKMC has extensive experience, indeed is at the forefront nationally, in litigating complex ERISA breach of fiduciary duty class actions. Lite DePalma is similarly qualified. Given the lack of conflict and the retention of highly experienced and competent counsel, Plaintiff is an adequate Class representative.

V. THE CLASS MAY BE PROPERLY CERTIFIED UNDER RULE 23(B)(1)

In addition to satisfying all of the criteria of Rule 23(a), a party seeking class certification must also satisfy one of the requirements of Rule 23(b). Pursuant to the Settlement Agreement, the parties have agreed to seek class certification under

Rule 23(b)(1). Having established all of the requirements of Rule 23(a) are established here, Plaintiff submits that the requirements of subsection 23(b)(1) are also met.

A. The Proposed Class Meets the Requirements of Rule 23(b)(1)

Under Rule 23(b)(1), a class may be certified if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Therefore, Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *Ikon*, 191 F.R.D. at 466. Certifications under both sections of Rule 23(b)(1)(A) and (B) are common in ERISA breach of fiduciary duty cases because of the Defendants' alleged "unitary treatment" of the individual members of the proposed Class. *Id.* (citation omitted). *See also* FED. R. CIV. P. 23(b)(1)(B), Advisory Comm. Notes to 1996 Amendment (stating that certification under 23(b)(1) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries). However, many courts granting class certification of ERISA claims do so under Rule 23(b)(1)(B). *See Moore v. Comcast Corp.*, 268 F.R.D. 530 (E.D. Pa. 2010) (granting class certification under 23(b)(1)(B)).[22]

Here, the Complaint alleges breaches of fiduciary duties under ERISA. Therefore, as noted *supra*, the only remedy available to participants of the Plan is Plan-wide relief, including the restoration of losses to the Plan. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-40 (1985). Thus, actions such as the instant one for breaches of fiduciary duty under ERISA are by law representative actions, which, if successful, will cause Defendants to be obligated to provide relief applicable to the Plan. This Court specifically recognized as much during the preliminary approval hearing, noting certification under 23(b)(1) "seems to be most fitting given the nature of this kind of settlement, where monies will be paid into the plan." Preliminary Approval Hearing transcript at 20. Indeed many courts – including the Third Circuit here – have noted that such cases are "paradigmatic

[22] Similar ERISA breach of fiduciary duty cases granting class certification under subsection 23(b)(1)(B) include: *Brieger v. Tellabs*, 245 F.R.D. 345, 357 (N.D. Ill. 2007) ("[S]eparate actions by individual plaintiffs would impair the ability of other participants to protect their interests if the suit proceeded outside of a class context."); *Enslava v. Gulf Telephone Co.*, No. 04-CV-0297, 2007 WL 2298222, at *6 (S.D. Ala. Aug. 7, 2007) (certifying a Rule 23(b)(1)(B) class because "[a]ddressing this claim in an individual action would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication."); *Lively v. Dynegy*, No. 05-CV-0063, 2007 WL 685861, at *16 (S.D. Ill. Mar. 2, 2007) (class certified because "adjudications with respect to individual members of the proposed class will as a practical matter be dispositive of the interests of other class members.").

examples of claims appropriate for certification as a Rule 23(b)(1) class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 604; *see also Harris v. Koenig*, No. 02-CV-618, 2010 WL 4553537, at *9 (D.D.C. Nov. 12, 2010). Accordingly, in recent years, numerous courts have certified class action claims in virtually identical circumstances.[23]

Therefore, in sum, this Action should be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of the Plaintiff's proposed Class as described above.

B. BTKMC Should Be Appointed Lead Counsel for the Class and Lite DePalma Greenberg Appointed Liaison Counsel for the Class

As discussed *supra* in section II.A, the Court has appointed BTKMC as class counsel and Lite DePalma as liaison class counsel. Rule 23(g) requires the Court to examine the capabilities and resources of counsel for the Class to determine whether they will provide adequate representation to the Class. Here, Lead Counsel has done substantial work to identify and investigate potential claims in the Action, and they have refined the allegations through the Complaint. Lead Counsel has also investigated the allegations made in the Action by interviewing witnesses, reviewing publicly available information, and reviewing documents obtained from Defendants. Lead Counsel have substantial experience in handling class actions, other complex litigation, and claims of the type asserted in this Action. Lead Counsel has litigated numerous similar ERISA class action cases. A complete description of the relevant experience of BTKMC and Lite DePalma is contained in the resumes of BTKMC and Lite DePalma, attached to the Meltzer Declaration as Exhibits L and O, respectively, for the Court's reference. *See also* Fee Memorandum at pages 24-26. Hence, Lead Counsel's extensive efforts in prosecuting this case in combination with their in-depth knowledge satisfy Rule 23(g).

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[23] *See, e.g.*, *George*, 2010 WL 3386402, at *11 ("Courts have held that, in light of the derivative nature of Section 1132 (a)(2) claims, breach of fiduciary duty claims brought under this statutory provision are 'paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.'") (citing *In re Schering Plough Corp.*, 589 F.3d at 604) (citing cases)); *Hans v. Tharaldson*, No. 05-CV-115, 2010 WL 1856267 (D.N.D. May 7, 2010) (certifying class under Rule 23(b)(1)(A) and 23(b)(1)(B)); *Moore*, 2010 WL 1375462 (E.D. Pa. Apr. 6, 2010) (certifying 23(b)(1)(B) class); *Stanford*, 263 F.R.D. at 172 (certifying 23(b)(1)(A) and (B) class); *Merck & Co., Inc. Securities, Derivative & ERISA Litig.*, MDL No. 1658, 2009 WL 331426 (D.N.J. Feb. 10, 2009) (same).

VI. THE COURT SHOULD ALSO APPROVE THE PROPOSED PLAN OF ALLOCATION

"Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards if review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Mehling*, 248 F.R.D. at 463. Under the Plan of Allocation here,[24] the net proceeds of the Class Settlement Amount will be allocated to Class members on a *pro rata* basis

[24] *See* Proposed Plan of Allocation attached to the Meltzer Declaration as Exhibit D.

such that the amount received by each Class member will depend on the loss in his or her Plan account, relative to the losses of other Class members in their Plan accounts. The relative loss for the Fund claims is calculated based on (A) the value of the participants' Plan account interest in Schering-Plough Stock at the beginning of the Class Period plus (B) the amount invested in Schering-Plough Stock during the Class Period minus (C) the amount withdrawn from Schering-Plough Stock during the Class Period minus (D) the value of Schering-Plough Stock holdings in the participant's Plan account at the end of the Class Period.

All participants are treated equally under the formula. The allocation method set forth herein is the basic approach that has been used in settlements of other 401(k) company stock cases, and it has been approved by judges in numerous cases. *See, e.g.*, Plan of Allocation and Final Judgment in *Lewis v. El Paso Corp.*, No. 02-cv-4860 (S.D. Tex. Apr. 27, 2009) (attached to the Meltzer Dec. as Exhibit E); Plan of Allocation and Order and Final Judgment in *In re Loral ERISA Litig.*, No. 03-cv-9729 (LTS) (S.D.N.Y. Jan. 20, 2009) (attached to the Meltzer Dec. as Exhibit F); Plan of Allocation and Order Approving Plan of Allocation *in In re Calpine Corp. ERISA Litig.*, No. C 03-cv-1685 (SBA) (N.D. Cal. Dec. 17, 2008) (attached to the Meltzer Dec. as Exhibit G).

VII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant Plaintiff's motion for final approval of the proposed Settlement, certification of a Settlement Class and approval of the Plan of Allocation.

Dated: December 6, 2010

Respectfully submitted,

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